

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**RAFAILA M. BROCKISH**

Claimant

VS.

**DILLON COMPANIES, INC.**

Self-Insured Respondent

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Docket No. 1,048,668

**ORDER**

Respondent appealed the August 24, 2012, Award entered by Special Administrative Law Judge (SALJ) C. Stanley Nelson. The Workers Compensation Board heard oral argument on January 16, 2013.

**APPEARANCES**

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The record considered by the Board and the parties' stipulations are listed in the Award. The parties stipulated that the IME report of Dr. Jennifer Scott Koontz is part of the record. The administrative file contains a written stipulation that respondent is to pay unauthorized medical benefits in the statutory amount of \$500.00.

**ISSUES**

In the August 24, 2012, Award, SALJ Nelson determined claimant was permanently and totally disabled and awarded claimant benefits for said disability. The SALJ did not make a finding with regard to claimant's functional impairment. SALJ Nelson also ordered respondent to provide pain management medical services to claimant.

Respondent contends claimant sustained a 10% functional impairment. Respondent maintains that claimant is not permanently and totally disabled and, instead, is entitled to a 58% work disability. Respondent alleges that if claimant is permanently and totally disabled, the SALJ erred in his calculation of the award.

Claimant contends her functional impairment is 15% and requests the Board affirm the SALJ's findings on all other issues.

The issues before the Board on this appeal are:

1. What is claimant's functional impairment?
2. Is claimant permanently and totally disabled?
3. If not, what is claimant's work disability?
4. Did the SALJ err in calculating the award?

#### **FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds:

On September 27, 2009, claimant injured her back while lifting a tote box. Claimant testified she underwent an L4-5 discectomy by Dr. Samuel Bourn in May 2010. However, Dr. Bourn's records were not placed into evidence. Nor was there anything placed in the record providing additional details concerning the aforementioned surgery. Claimant was off work for 40 weeks after the accident. She was then restricted by Dr. Pat D. Do to work six hours a day, five days a week, before being released to full-time duty in March 2011.

From January 2011 through May 11, 2011, claimant worked as a scanner for respondent. She would change tags on the shelves and made sure the items rang up correctly. She would also check products to make sure they were not outdated, and filled shelves. This required crouching and squatting 80% of the time, twisting, turning and bending and required her to walk or stand all day. Claimant testified her job duties exceeded the restrictions placed upon her by Dr. Do. On two occasions she complained to the store manager where she worked about exceeding her restrictions, but no action was taken by respondent.

Respondent terminated claimant on May 11, 2011, for poor attendance. Claimant testified that her attendance issues were caused by back pain. In January 2011, claimant would miss work, due to back pain, two or three days a week. Thereafter, her attendance became even worse. In April 2011, claimant only worked one to two days a week.

Since she was discharged by respondent, claimant has been unemployed. She received unemployment benefits for approximately two months. Claimant testified the longest she can sit before having to get up and move around is 10 to 20 minutes and that she can stand only 10 to 20 minutes before she has to sit or lie down. No matter what posture claimant is in, she has back pain. She has tried heating pads, cold packs and Icy Hot without getting relief from back pain. At the October 18, 2011, session of the regular hearing, claimant testified that the last time she saw an authorized physician was in May 2011, when she visited Dr. Do.

Dr. Do testified that he provided claimant treatment from March 2010 until May 19, 2011, when Dr. Do determined claimant was at maximum medical improvement. Dr. Do opined claimant was in DRE Lumbosacral Category III of the *Guides*<sup>1</sup> and had a 10% whole person functional impairment. His explanation was, "She would be a Category III with continued back pain, radicular symptoms, which Lumbosacral Category III would be about a 10 percent whole person impairment."<sup>2</sup>

Dr. Do indicated claimant had numbness in both legs. Dr. Do provided claimant with permanent restrictions that are set forth in SALJ Nelson's Award. Dr. Do testified as follows concerning his restriction that claimant alternate her positions:

Q. (Mr. Riedmiller) She's testified that she can sit at a maximum of 10 to 20 minutes at a time and stand at a maximum of 10 to 20 minutes at a time before she has to change these postures.

A. (Dr. Do) That sounds very accurate. I would say, generally speaking, that you can even make it 50 percent stand, 50 percent walk so it's not set in stone. So that's consistent with what you're saying to what I was thinking.

Q. But she's going to have to rotate between these postures of sitting and standing in order to be able to perform any work in the foreseeable future; true?

A. Ideally, yes.<sup>3</sup>

Based upon the task analysis report of vocational expert Steve Benjamin, Dr. Do opined claimant could no longer perform 6 of 38 non-duplicative tasks for a 16% task loss. However, based upon the task performance capacity assessment of human resource consultant Jerry D. Hardin, Dr. Do opined claimant could no longer perform 30 of 31 non-duplicative tasks for a 97% task loss. It was the opinion of Dr. Do that the restrictions he

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>2</sup> Do Depo. at 10.

<sup>3</sup> *Id.*, at 26.

imposed on claimant would prevent her from returning to her jobs with respondent or her previous jobs at Home Depot, Wal-Mart, Target, Payless Shoe Store and Three River Independent Living Center. Dr. Do was not asked to give an opinion on whether claimant was permanently and totally disabled.

Upon cross-examination, Dr. Do confirmed that he referred claimant to Dr. Henry to consider undergoing a discogram, but claimant declined the discogram because of not wanting additional surgery. Dr. Do characterized claimant's condition as failed back surgery syndrome, as her previous back surgery did not relieve the condition she had before the surgery. He prescribed claimant Tramadol and Flexeril and indicated she would need them for the foreseeable future. Dr. Do stated that ideally, claimant should be seen by a pain medication management specialist.

At the request of her attorney, on December 1, 2010, and June 30, 2011, claimant was evaluated by Dr. Pedro A. Murati. His impressions in the June 30, 2011, report were status post L4-5 discectomy, failed back surgery syndrome and bilateral SI dysfunction. Dr. Murati opined claimant was between DRE Lumbosacral Category III and Category IV of the *Guides* and had a 15% whole person functional impairment. He gave the following explanation for his rating, "According to the Fourth Edition of the Guides to the Evaluation of Permanent Impairment, for the low back pain status post L4 through 5 discectomy I place this claimant in between lumbosacral DRE category III and IV 15 percent whole person impairment."<sup>4</sup>

Dr. Murati's restrictions for claimant were described in detail by SALJ Nelson in the Award.<sup>5</sup> Based upon the task performance capacity assessment of Mr. Hardin, Dr. Murati opined claimant could no longer perform 30 of 31 non-duplicative tasks for a 97% task loss. He also believed that as a result of the restrictions he imposed upon claimant, she could no longer return to any of the jobs she performed in the 15 years before her accident. Dr. Murati testified claimant was realistically and essentially unemployable.

By agreement of the parties, on July 11, 2012, claimant was evaluated by Dr. Jennifer Scott Koontz to determine if claimant's elevated blood pressure was the result of her work-related injury. Dr. Koontz opined claimant's elevated blood pressure was either preexisting or secondary to pain and that no specific hypertension evaluation or treatment would be related to claimant's work injury. Claimant did not pursue this as an issue.

At the request of respondent, Mr. Benjamin was asked to perform a task analysis evaluation of claimant. Mr. Benjamin reviewed the reports of Drs. Do and Murati,

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<sup>4</sup> Murati Depo. at 15-16.

<sup>5</sup> However, SALJ Nelson's Award did not state clearly Dr. Murati's restriction that claimant be allowed to rest every hour for 30 minutes.

interviewed claimant and prepared a task analysis report. During the interview, claimant disclosed that she received unemployment benefits between July and September 2011. He determined that claimant had performed 38 non-duplicative job tasks in the 15 years prior to her accident.

Based upon the restrictions of Dr. Do, Mr. Benjamin was of the opinion claimant could obtain employment in the open labor market and earn wages from a range of \$310.40 to \$389.20 per week. Mr. Benjamin acknowledged that the jobs available to claimant would be near-minimum-wage jobs and all would be similar to the jobs she previously held.

Using Dr. Murati's restrictions, Mr. Benjamin was of the opinion claimant was essentially and realistically incapable of substantial and gainful employment. Mr. Benjamin also opined, again using Dr. Murati's restrictions, that claimant was permanently and totally disabled.

Mr. Hardin interviewed claimant by telephone on July 14, 2011, and reviewed the reports of Drs. Do and Murati. He determined that claimant had performed 31 non-duplicative job tasks in the 15 years prior to her accident. Mr. Hardin testified that at the time he interviewed her, claimant was 41 years of age and had a high school education, but no other formal education or training. Claimant's work experience was primarily in retail sales and customer service. Mr. Hardin opined that given the restrictions placed upon her by Drs. Do and Murati, claimant had no transferrable job skills. It was Mr. Hardin's opinion, after considering the restrictions of Drs. Do and Murati, that claimant was essentially and realistically unemployable. Mr. Hardin based the foregoing opinion on the fact claimant was restricted to occasional standing and walking. All of the jobs claimant performed in the past were mainly all standing and walking jobs. Mr. Hardin indicated there were a limited number of jobs claimant could perform. However, Mr. Hardin testified that given claimant's restrictions, she likely would be one of the last applicants for those jobs to be hired.

SALJ Nelson did not make a finding concerning claimant's functional impairment rating and did not determine claimant's task and wage losses. The SALJ concluded claimant was permanently and totally disabled and cited the opinions of Drs. Do and Murati, Mr. Hardin and Mr. Benjamin. The SALJ found it significant that Mr. Benjamin, based upon Dr. Do's restriction of alternating between one posture or another every 20 minutes, concluded claimant was essentially and realistically unemployable within the Hutchinson market and could not travel to another market.

The parties do not dispute that claimant is entitled to \$14,709.05 in temporary total disability and temporary partial disability payments, which is the equivalent of 52.24 weeks at the weekly rate of \$281.55. Claimant testified that after her injury she was completely off work for 40 weeks and then worked part time for a period of time. Respondent objected to SALJ Nelson's calculation of the award.

**PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>6</sup> “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”<sup>7</sup>

The parties are at odds over claimant’s functional impairment. Respondent urges the Board to adopt the 10% functional impairment rating of Dr. Do, while claimant asserts Dr. Murati’s 15% functional impairment is appropriate. Both experts only gave summary explanations of how they arrived at their respective functional impairment ratings. Neither party introduced a copy of the section of the *Guides* that contains DRE Lumbosacral Categories III and IV.

The Board adopts the opinion of Dr. Do on functional impairment and finds claimant has a 10% whole body impairment. Dr. Do determined claimant had back pain and evidence of radiculopathy. That places claimant in DRE Lumbosacral Category III of the *Guides*. Dr. Murati indicated claimant was between DRE Lumbosacral Category III and IV, but gave little explanation of why that was true.

The next issue is whether claimant was rendered permanently and totally disabled by the work-related injuries she sustained on September 27, 2009. K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

If the opinions of Dr. Murati and Mr. Hardin are adopted, there is little dispute that claimant would be considered permanently and totally disabled. Dr. Murati opined, based upon Mr. Hardin’s job task analysis, that claimant had a 97% task loss. Mr. Hardin testified that if either Dr. Do or Dr. Murati’s restrictions were followed that claimant was essentially unemployable.

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<sup>6</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>7</sup> K.S.A. 2009 Supp. 44-508(g).

Respondent argued that Dr. Do's restrictions would not render claimant permanently and totally disabled. In his work restriction report, Dr. Do restricted claimant to occasional standing and walking, which is up to 33% of the day. Dr. Do testified that an employer would have to allow claimant to sit or stand after 20 minutes of one posture or the other. He also described as accurate claimant's testimony that she could only sit or stand a maximum of 10 to 20 minutes before having to change positions. Dr. Do opined that if Mr. Hardin's job task analysis were utilized, claimant had a 97% task loss. It was the opinion of Dr. Do that the restrictions he placed upon claimant would eliminate the jobs she performed in the 15 years prior to her accident. The Board finds that whether the restrictions of Dr. Murati or Dr. Do are used, claimant is realistically unemployable in the open labor market and is permanently and totally disabled.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>8</sup>

The Board finds that the SALJ incorrectly calculated how claimant's benefits are awarded. Beginning with her date of accident, claimant would be entitled to the equivalent of 52.24 weeks of temporary total disability payments. Thereafter, claimant would be entitled to permanent partial disability payments based upon her functional impairment until her employment with respondent ended on May 11, 2011. Thereafter, claimant would be entitled to permanent total disability payments.

### **CONCLUSION**

1. Claimant sustained a 10% whole person functional impairment.
2. Claimant proved by a preponderance of the evidence that she is permanently and totally disabled as the result of the work-related injuries she sustained on September 27, 2009. Therefore, it is unnecessary for the Board to determine the nature and extent of claimant's work disability.
3. SALJ Nelson incorrectly calculated the award by not awarding permanent partial disability based upon functional impairment.

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<sup>8</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>9</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the August 24, 2012, Award entered by SALJ Nelson as follows:

Rafaila M. Brockish is granted compensation from Dillon Companies, Inc., for a September 27, 2009, accident and resulting disability. Based upon an average weekly wage of \$422.31, for the period ending May 11, 2011, Ms. Brockish is entitled to receive 52.24 weeks<sup>10</sup> of temporary total disability benefits at \$281.55 per week, or \$14,709.05, followed by 32.14 weeks of permanent partial disability benefits at \$281.55 per week, or \$9,049.02, for a 10% permanent partial general disability. Commencing May 12, 2011, Ms. Brockish is entitled to receive 359.59 weeks of permanent total disability benefits at \$281.55 per week, or \$101,241.93, for a permanent total disability and a total award not to exceed \$125,000.00.

As of March 28, 2013, Ms. Brockish is entitled to receive 52.24 weeks of temporary total disability benefits at \$281.55 per week in the sum of \$14,709.05, followed by 32.14 weeks of permanent partial disability benefits at \$281.55 per week in the sum of \$9,049.02, followed by 98.14 weeks of permanent total disability benefits at \$281.55 per week in the sum of \$27,631.32, for a total due and owing of \$51,389.39, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$73,610.61 shall be paid at \$281.55 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

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<sup>9</sup> K.S.A. 2012 Supp. 44-555c(k).

<sup>10</sup> The parties agreed that the payments of temporary total disability and temporary partial disability benefits totaled \$14,709.05, which is equivalent to 52.24 weeks at \$281.55 per week. See pages 5-7 of the October 18, 2011, regular hearing transcript. For purposes of this award, these weeks of benefits will be utilized and awarded as temporary total disability benefits.



Dated this \_\_\_\_ day of March, 2013.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
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C. Stanley Nelson, Special Administrative Law Judge